The Solicitors' Journal

Vol. 95 November 10, 1951 No. 45

CURRENT TOPICS

The New Administration

WITH the completion of the list of appointments to offices in the new Government it is possible again to note the value placed by those who select persons for responsible positions on a purely legal training. Apart from those offices which can only be open to lawyers, the office of Home Secretaryship has gone to Sir DAVID MAXWELL FYFE, K.C., the Ministry of Labour has gone to Sir WALTER MONCKTON, K.C., and Mr. SELWYN LLOYD, K.C., is to be Minister of State. The high eminence and achievements of these Ministers in the legal profession need no emphasis here. Mr. J. G. FOSTER, K.C., also well known at the Bar, becomes Parliamentary Under-Secretary in the Commonwealth Relations Office, and Mr. L. W. JOYNSON-HICKS brings a solicitor's experience to the office of Parliamentary Secretary, Ministry of Fuel and Power. LORD SIMONDS (famous at the Bar as Gavin Simonds, K.C., and outstanding as a judge of the Chancery Division and as a Lord of Appeal) becomes Lord Chancellor. Mr. LIONEL HEALD, K.C., pre-eminent in patents work and other fields, becomes Attorney-General, and Mr. R. E. MANNINGHAM-BULLER, K.C., well known both in politics and at the Bar, becomes Solicitor-General.

The Good Solicitor

THE wit and wisdom of the present Master of the Rolls, Sir RAYMOND EVERSHED, was amply illustrated in his address on "The Office of the Master of the Rolls," reported in the November issue of the *Law Society's Gazette*, which he gave at The Law Society's Annual Conference at Harrogate on 27th September. On the subject of misunderstandings as to the nature of his office he quoted a lady's request to him to show her and her daughters around the stables of Buckingham Palace, and the efforts of foreign translators, who described him as "*Maître des petits pains.*" He said that he was proud of his association with the great profession of solicitors, and particularly so because of his father's membership of it. Sir Raymond's prescription of the qualities required of a really good solicitor was: "A man who above all must have judgment, a man who does not look up law books, nor even read the judgments of the Master of the Rolls, but who knows what is right and wise and what is wrong and foolish; a man who sustains his client when things have gone rather ill with him, but who holds him back when he might be inclined to be reckless; above all, a man of whom the rest of the community say: 'There is a man I know can be absolutely trusted'."

A Plan for Road Traffic

CONSTRUCTIVE proposals aimed at substantially reducing the number of deaths and mutilations in road accidents are rare enough nowadays to merit serious attention. At all costs we must not let ourselves drift into the apathetic conclusion that everything has been tried and nothing further can be done. In an address to representatives of the Road Safety Councils in Metropolitan Essex, on 18th October, Mr. EDWARD TERRELL, Recorder of Newbury, author of what has been called the Terrell Plan, criticised the Highway Code as a badly drafted code, carrying no kind of sanction. He

CONTENTS

said that if the negligence that does not result in an accident could be reduced by 50 per cent., then the death and casualty rate on the road would be automatically halved. Clear rules for road users should be drafted, he said, which should be placed in a separate part of the code from that containing recommendations and advice. A breach of any of those clear rules would be either dangerous or careless driving, according to the facts of each case as found by the court. He distinguished road offenders from ordinary criminals in that they do not really intend the ordinary consequences of their negligence, and urged that the main sanction for a breach of duty on the roads should be suspension of licences. The law, he said, will be best administered by the ordinary courts, which enjoy the confidence and trust of the public. He also proposed that sanctions should be created to ensure careful riding by cyclists and careful walking by pedestrians. The plan has much to commend it. It is simple, it appeals to our common sense and, unlike some other schemes, it can be put into operation without great expense. A new draft code for consideration by all the responsible authorities should be prepared without delay.

Town and Country Planning: Mineral Charge Set-Off

THE Council of The Law Society draw the special attention of solicitors, in the November issue of the *Law Society's Gazette*, to reg. 4 of the Mineral Development Charge Set-Off Regulations, 1951, which are now awaiting approval by Parliament. This regulation gives certain rights of contracting out from the regulations as a whole to persons who have claims on the £300 million fund in respect of "near-ripe" minerals, but who have no interest in the minerals themselves. The Council point out that amendments since the regulations were originally published in draft include suggestions made by The Law Society. A provision for contracting out was clearly required because the effect of the regulations as a whole is that payments from the fund will only be made in respect of such minerals if their working is prevented because of refusal or revocation of planning permission, compulsory purchase, etc. If the working of the minerals is not thus prevented, and the minerals are accordingly worked, the claim on the fund will be set off against the development charge that is payable. It follows, the note says, that a claimant who has no interest in the minerals themselves will in that event receive nothing unless he exercises his right to contract out. The note explains the severe limitations in reg. 4 on the right of contracting out and also points out that apart from the Board's dispensing power in certain cases, solicitors have only a comparatively short time in which to digest the regulations, as notice of contracting out must be given within a period varying between six and nine months of the regulations coming into force.

Copyright Term

PROFESSOR SIR ARNOLD PLANT has submitted to the Copyright Committee a proposal that the full term of copyright should be reduced to fifty years from the date of first publication, and that the open licence period should be retained for the last twenty-five years of the copyright term. He further recommended that any reduction of the open licence period for works of an exceptional character should depend on the favourable recommendation of a suitable tribunal after examination of a special application in each case. In the course of his evidence, which he gave on 29th October, Sir Arnold thought it was to be deplored that George Bernard Shaw's works of 1880 might not be reprinted until the year 2000. He considered that copyright gave an increased incentive to producers and their employees.

Excess Profits Tax

THE editorial article in the 1st November issue of *Accountancy* gives an outline of the reliefs included in the American excess profits tax, about which there appears to have been very little, if anything, previously published in this country. The American reliefs are important since Mr. R. A. BUTLER, now Chancellor of the Exchequer, stated at a Press conference on 3rd October that American experience of them would be brought into any final plan of a Conservative Government for excess profits tax. The reliefs operate in the following conditions: (1) If there were abnormal events or circumstances which reduced income in the base period. The reduction in income need be only nominal; (2) if new products were produced for the first time in the base period and form a (defined) substantial part of current output; (3) if productive capacity, in a physical sense, was increased by more than stipulated proportions in the base period; (4) if the business is a new one; (5) if the business is in an industry which was depressed in 1946–48 (its profit rate was less than 63 per cent. of the rate in 1938–48). The writer adds: "These general reliefs are, in a sense, an interesting elaboration of the system adopted for the first British tax on excess profits, the excess profits duty of World War I, under which standard profits of the base period were in many instances arrived at via the application of varying rates of permitted return on capital which were laid down for a long list of industries. It would be a little quixotic if the third British tax on excess profits jobbed back to the first by way of the Atlantic Ocean."

The Annual Conference: Committee Reports

IN this issue we are able to complete our report (*ante*, p. 640) of the Final Session of the Annual Conference of members of The Law Society held at Harrogate, by setting out the reports of the chairmen of the various committees of the conference. These reports are reprinted, by permission of The Law Society, from the November issue of the *Law Society's Gazette*. We regret that it has not been possible to publish them earlier, for reasons beyond our control.

National Insurance Decisions

AS a service to lawyers and others an index of leading decisions by the National Insurance Commissioner (who is also the Industrial Injuries Commissioner) has been published by H.M. Stationery Office, price 8s. 6d. Amendments are to be published monthly, and these will be available for an annual subscription of 5s. The decisions covered include cases on unemployment benefit, sickness benefit, widow's benefit, retirement pensions, industrial accidents and prescribed diseases.

Gray's Inn Hall

THE public has been given a glimpse of the restored glories of Gray's Inn Hall, which was burnt out in an air-raid in May, 1941. It is now nearly ready for its official reopening by the DUKE OF GLOUCESTER, in the presence of Master of the Bench WINSTON CHURCHILL, on 5th December. *The Times* of 3rd November contains pictures of the hall as it was immediately after the bombing and as it is to-day, as well as a detailed description of the restoration. Those who have had the privilege of seeing the marvellous work that has been done must have been struck with the thought that if it was a horrible experience to see the hall burnt out, it is a compensation that it is now possible to see what it probably looked like when it was first built, hundreds of years ago.

A Conveyancer's Diary

RULES OF CONVENIENCE

A RULE of convenience, sometimes also referred to as the rule in *Andrews* v. *Partington* (1791), 3 Bro. C.C. 401, is stated in the third edition of Hawkins on Wills as follows (p. 96): "Where there is a bequest of an aggregate fund to children as a class, and the share of each child is made payable on attaining a given age, or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and children coming into existence after that date are excluded"; and (p. 97): "If the gift be in remainder to a life interest, as a bequest to A for life and after his decease to the children of B payable at twenty-one, the period of distribution is the later of the two events to which payment is postponed: thus, if a child attains twenty-one in the lifetime of A, children born afterwards in A's lifetime are admissible; and if at the death of A no child has attained twenty-one, children born after A's death before the first child attains twenty-one are admissible."

This rule has frequently been regarded as unjust, and courts have been astute to seek—not always with success—ways of distinguishing cases so as to avoid its application. In *Re Chartres* [1927] 1 Ch. 466, for example, Astbury, J., observed that the rule "is, of course, obviously convenient to those who take under it, to the exclusion of others intended to benefit, but the irony of the rule is no doubt more apparent to those who are by its application excluded from taking what the testator intended them to take"; but although in that case the result of applying the rule was strikingly similar to the results of a fraudulent appointment, the learned judge nevertheless felt the force of authority to be too strong to enable him to disregard it, and the rule was applied. Of course, there was a reasonable explanation for the birth of the rule and its continued existence, to be balanced against the apparent injustice of its application; the essence of the reason was stated by Jessel, M.R., in *Re Emmet's Estate* (1880), 13 Ch. D. 484, where he said (at p. 490), with characteristic economy of words, that "there has . . . been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund."

These remarks are intended by way of introduction to the decision of the Court of Appeal in *Re Bleckly*, p. 535, *ante* ([1951] Ch. 740), reversing the decision of Harman, J., p. 206, *ante* ([1951] 1 All E.R. 628). In this case a testator settled a fund upon trust to pay the income to his daughter-in-law G, the wife of his son H, while she should remain the wife or widow of H, and subject thereto upon trust for all or any the children of his son H who should attain the age of twenty-one, if more than one in equal shares. The testator died in 1925. In 1927 the marriage between G and H (which was childless) was dissolved, and in the same year H married again. Of this second marriage there were two children, a son who died in infancy and a daughter T who attained twenty-one in 1950. T claimed that in the events which had happened the fund was payable to her absolutely, in accordance with the rule above stated.

Harman, J., refused to apply the rule on the ground (shortly stated) that the rule had no application to a case such as this where, at the termination of the prior life interest (the dissolution of the marriage between G and H), there was not in existence any member of the class of children who were to take in remainder: the rule, in his view, was well established, but it had been frequently applied with distaste, and he would not extend it to circumstances to which it had not been applied before. This reasoning was to some extent supported by the views expressed in the text-books. Thus, in dealing with the case of an immediate gift to children who attain twenty-one, as opposed to a gift in remainder to such children, a passage in Jarman on Wills (7th ed.) states, at p. 1665, that "where the gift is to the children of A on attaining twenty-one, and no child of A is in existence at the testator's death, it is doubtful whether all the children of A who attain twenty-one will be entitled, or only those who are in existence when the eldest attains that age"; and similarly in Theobald on Wills (10th ed.), at p. 235: "It seems doubtful whether, if there are no children at the testator's death, all would be admitted, whether born before or after the eldest attains twenty-one." On the other hand it is stated as a rule in Jarman (at p. 1667) that a bequest to A for life and after his death to the children of B is not defeated by the non-existence of any children of B at the death of A, but takes effect in favour of all the subsequently born children as they arise. This statement refers to the case where attainment of a given age is not a necessary qualification for membership of the class, and the question which the Court of Appeal had to decide in *Re Bleckly* was whether this rule, or the rule of convenience, applied where the attainment of a given age is a necessary qualification for membership of the class and no member of the class is in existence at the termination of a prior interest in the fund.

This was a question which had never been referred to the court in any reported case, and it was argued in opposition to T's claim that the class which the testator had specified as the class to take in remainder was described by him as "all or any" the children of H who should attain the age of twenty-one, and that to permit T to take the whole fund was thus clearly at variance with the testator's expressed intention. But the court rejected this argument. In their view, if the language of the will so requires upon its fair construction, the rule of convenience must give way to the language; but the rule was an old one, and the will had to be read in the light of the rule, and the words used by the testator, without more, were insufficient to exclude its application. As the Master of the Rolls observed, if the testator had added words of emphasis indicating that all members of the class should participate, whatever their dates of birth, the result might well have been different, but the use of the words "all or any" did not have this emphatic quality.

There being nothing in the language in which the gift was expressed to exclude the application of the rule, the question of its exclusion or application to the particular facts had to be decided on general principles, and on general principles the conclusion was that the rule should be applied. In the view of Jenkins, L.J., there was a distinction between the case of a gift to A for life with remainder to the children of B *simpliciter*, and a gift to A for life with remainder to the children of B who should attain twenty-one: in the former case the only period of distribution indicated by the will is the termination of A's life interest, and obviously, in the event of there being no children of B in existence at the death of A, that period could not be applied—the result of doing so would be to defeat the gift completely—and whether it is convenient or not the class is thrown open to admit all after-born children; but in the latter case, which for all practical purposes was the case before the court, the period

of distribution indicated by the testator is the later of two events (as pointed out in the second of the two passages from Hawkins on Wills, cited above), that is, the death of the person entitled to a life or other limited interest in the fund or the attainment of twenty-one by the first of the designated class to attain that age; and as the application of the rule to this latter case would not defeat the gift in remainder, there was no ground for not applying it.

The result of this decision is to make it clear that the rule for ascertaining the period of distribution in the case of a gift to A for life with remainder to the children of B who should attain a given age is not affected by the non-existence at A's death of a member of the class of the children of B, and whether a number of the designated class is in existence at the death of A or not the same rule applies. This is a decision of some importance. It is true that in the precise form which it took in this case a gift of this kind is not common, since gifts in remainder to a class of children are usually limited after a gift to one of their parents *eo nomine*. But a gift to A for life with remainder to the children of A who should attain a given age and in default of such children to the children of B who should attain the said age is not at all uncommon, and if there is a failure of A's children, the rule applied in *Re Bleckly* will apply to such a case. But it may be that many practitioners who have not in the course of practice come across either this rule, or the distinct rule which governs the ascertainment of the period of distribution in the case of gifts to a class of children *simpliciter*, will be in some danger of concluding that in either case the non-existence of a member of the specified class at the death of the testator or life-tenant causes the gift in remainder to fail, and that an intestacy therefore results, with unfortunate consequences if children of the specified class later come into existence and become acquainted with the *Diplock* decision. The clearing up of a doubt regarding the applicability of this rule to particular circumstances thus affords a good opportunity of drawing attention generally to a rule the existence of which, I think one can safely say, would not ordinarily be suspected by any process of intuitive thought.

"A B C"

Landlord and Tenant Notebook

CONDITIONAL OPTION TO BREAK

"LESSEE'S Option to Determine: An Indefensible Condition" ran the heading of a letter published under "Correspondence" in our issue of 20th October last (95 SOL. J. 673). The writer's criticism was directed at the form of option which makes the lessee's right conditional on his "up to the time of such termination paying the rent and performing the covenants hereinbefore reserved and contained" which, he says, may expose a tenant to the risk of his landlord coming along, weeks or months after notice to break has been given, and invalidating the notice on the ground of some trivial breach of covenant.

Substantially, I agree with our correspondent's strictures on this type of provision, the nature of which was, I think, last examined in *Burch* v. *Farrows Bank, Ltd.* [1917] 1 Ch. 606. The plaintiff in that case had granted the defendants a *prima facie* twenty-one year lease of premises from 24th June, 1909, they covenanting to repair, and a proviso said "... also and it is hereby agreed that if the lessee shall be desirous of determining this lease at the expiration of the first three, seven or fourteen years of the term hereby granted and of such desire shall give to the lessor six calendar months' previous notice in writing and shall pay all the rent and perform and *observe all the covenants* hereinbefore reserved and contained and on the part of the lessee to be paid, performed and observed *up to such determination*, then in such case immediately after the expiration of the said term of three, seven or fourteen years as the case may be this lease shall absolutely cease and determine, but without prejudice to the remedies of either of the parties hereto against the other in respect of any antecedent claim or breach of covenant." As counsel for the plaintiff observed, the clause was very similar to the form to be found in much respected books of precedents; and, if "termination" and "determination" mean the same thing, it is also similar to the form cited by our correspondent.

The defendants gave notice on 8th December, 1915, for 24th June, 1916, i.e., the end of the first seven years. The plaintiff and they then went into the question of disrepair, and ultimately the defendants began to carry out repairs on 23rd June, 1916, completing the work on 11th July. The plaintiff claimed, *inter alia*, a declaration that the lease was still subsisting; the defendants contended that they had retained possession in order to do the repairs.

The plaintiff was able to cite much authority for the proposition that the clause made performance of covenants a condition which had to be fulfilled when notice expired. The strongest case is perhaps *Grey* v. *Friar* (1854), 4 H.L. Cas. 565, in which lessees were entitled to determine by eighteen months' notice and "then and in such case, all arrears of rent having been paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed, this lease shall ... at the expiration of ... cease, determine and be utterly void ... But, nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." This authority was, of course, binding on Neville, J., and while the defendants were able to argue that there was nothing about being "utterly void" in the instrument before the court, the learned judge considered the case one of distinction without difference. The older decision also provided the plaintiff with an effective answer to the contention that the reservation of remedies for antecedent breaches had the effect of modifying the condition; indeed, Neville, J., suggested that the reasons for such reservation might include the possibility of breaches being unknown to the lessor when he accepted the "surrender" of the lease, and the possibility that he might prefer to rely on a remedy in damages.

It seems that in this case and in other reported cases the covenant concerned was broken both when notice was given and when it expired. I suggest that if the premises dealt with in *Burch* v. *Farrows Bank, Ltd.*, had been in good repair on 8th December, 1915, or at all events on 23rd December of that year, it might have been possible to argue that in that case, at all events, "up to such determination" meant up to the time when the lessees became desirous of and expressed their desire of determining the lease. For the giving of the notice and the payment of rent and performance of covenants were coupled as conditions; and the latter condition was "shall pay all the rent and perform and observe ... hereinbefore reserved and contained" etc., *not* "shall have paid all the rent and have

performed and observed," etc., which, I would submit, would be the correct wording if the clause were to be read as expressing a condition subsequent rather than or as well as a condition precedent.

In conclusion, I would make two minor observations on our correspondent's reference to "some trivial breach of covenant." Though *Finch* v. *Underwood* (1876), 2 Ch. D. 310 (C.A.), concerned a conditional right to a renewal and not to determination, and though it was decided on quite a different point than that of fulfilment or otherwise of the condition, there are *obiter* passages in the judgments of James and Mellish, L.JJ., which should have some persuasive effect in such a case as that visualised. "No doubt every property must at times be out of repair, and a tenant must have a reasonable time allowed to do what is necessary" observed the former; and the latter expressed the view that if the tenant honestly did what he thought necessary in order to comply with the covenants the court would "lean towards holding the condition to have been complied with." My other observation is that, on the other hand, it does appear that a tenant may find his notice invalidated as a result of happenings for which he is in no way to blame; e.g., if a few days before its expiration a negligently driven but heavily laden lorry were to crash through the ground floor of the subject-matter of the lease. The authorities being what they are, I agree that "indefensible" is not too strong a word to use when characterising a condition which may have this effect.

R. B.

HERE AND THERE

CHANCERY CHANCELLOR

WELL, if nobody thought of Lord Simonds as Lord Chancellor it was not that anyone could possibly have overlooked his forceful personality, his tall well-built figure (a Chancellor should always look the part) or the dominant forthrightness with which he has been presiding so often in the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council, while Lord Jowitt was submerged in administrative and political work elsewhere. Junior only to Lord Porter among the Law Lords, he has with him been taking the lead in their work for some time now, so in one function of his new office he has nothing to learn. People have rather got into the habit of thinking of a Law Lordship once reached as the epilogue or final goal of a legal career. In modern practice it is nothing of the kind. Thence Lord Goddard and Lord MacDermott proceeded onwards to their respective Chief Justiceships and here is Lord Simonds now proving it a prelude to an even more gloriously glittering prize than theirs. I suppose what put the Temple and the Fleet Street reporters off the scent was, first, the extreme rarity of a totally non-political choice for this particular appointment and, secondly, the odds against a Chancery Chancellor, roughly about two to one, for of the last fourteen occupants of the Woolsack, Lord Simonds is only the fifth from the equity side. The others were my Lords Haldane, Buckmaster, Cave and Maugham. When Gavin Simonds, K.C., became Simonds, J., in the Chancery Division in 1937, he was generally supposed to be leaving behind a practice of about £20,000 a year. Seven years later he was a Lord of Appeal. Seven years more and his next step has been to the Woolsack. It is sad that there is now no son to carry on his line. Like the late Lord Blanesburgh (whose unennobled name was Younger) Lord Simonds is a scion of an old-established brewing family. Its tradition at Reading goes back to the eighteenth century and has contributed to his arms the hop leaf on the shoulder of the dexter ermine that supports them. His motto: *Simplex Munditiis*. There's a great deal of quiet entertainment to be found in the pages of "Burke." The outgoing Lord Chancellor's supporters are two spaniels with a Chancellor's purse. Motto: *Tenax et Fidelis*.

THE LAW OFFICERS

IN the choice of the Law Officers, alike for the Southern and the Northern realm, political background again seems to have been a secondary consideration. Mr. Attorney, in the person of Heald, K.C., has only a twelve-month or thereabouts of Parliamentary strife behind him, though in that short time he succeeded, amid general applause, in driving the common informer off the statute book. Two remarkably different hands initiated him into the mysteries of the law, those of Sir Donald Somervell and Sir Stafford Cripps. He was pupil to both and I believe he has inherited as a sort of talisman the full-bottomed wig of the latter. (I am not sure that it was not originally Lord Parmoor's.) Thus, doubly sired in his profession, he would have no ground to lack self-confidence in his new appointment. It is a tribute to his versatility that he is probably the first Attorney-General to be chosen from the patent Bar. That is doubtless why his appointment was another example of "cheat the prophet." *Per contra*, the Solicitor-General was well in evidence in the forecasts. With eight years in the Commons, five years in "Silk," a Parliamentary Secretaryship and a large common law practice behind him, it was clear that something was coming his way or ought to. As for Scotland, Clyde, K.C., the new Lord Advocate, son of a judge, the late Lord Clyde, entered Parliament last year, while Milligan, K.C., the Solicitor-General, has never entered it at all.

CALLED FROM THE BAR

THE sequel to the General Election is proving particularly favourable to the Bar. Sir David Maxwell Fyfe and Sir Walter Monckton were, of course, predestined to high office anyway, though not necessarily where their lot has fallen. Selwyn Lloyd, K.C., spoken of as a possible Law Officer, has gone instead to the Foreign Office as Minister of State. Among his valuable assets are six years' Parliamentary experience, a sound Liverpool and London practice (in that order, for he is on the Northern Circuit) and, most important of all, a young and perfectly charming wife who is a model as a "working partner." Lord Reading, Parliamentary Under-Secretary for Foreign Affairs, John Foster, K.C., Under-Secretary, Commonwealth Relations, and H. G. Strauss, K.C., Parliamentary Secretary to the Board of Trade, came in on the later waves of appointments. The latter, by the way, has the not very common distinction of having already once resigned from a place in the Government on a matter of principle in disagreement with the policy that put a Yalta round our necks. The election of the Tory Morrison (W. S.) as Speaker of the Commons crowns in a somewhat unexpected fashion a legal-political career that might have led almost anywhere. A tall, quiet Highlander of great charm, he came to the English Bar. He married an Edinburgh girl who brought the more practical spirit of the Lowlands to a perfect and delightful partnership. She, too, was a member of the Bar, but did not practise. He entered politics in the wake of Sir Thomas Inskip (as he then was) and charmed everyone, his constituents in Gloucestershire, where he acquired the lovely Cotswold manor house at Withington, and the leaders of the Conservative Party in which it became accepted that he was destined to play a prominent role. At the Bar he took silk; in the Commons he held a succession of Ministerial posts but somehow (good luck and bad is an unfathomable mystery) he never developed as the potential national leader quite on the lines that had been expected. Perhaps charm and modesty are not the best recipe for that particular product, and perhaps in the impartial chair of the Speaker they will find just the very field for their exercise.

RICHARD ROE.

THE LAW SOCIETY—ANNUAL CONFERENCE

FINAL SESSION: REPORTS OF CHAIRMEN OF COMMITTEES

[Reprinted, by permission, from "The Law Society's Gazette," November, 1951; for previous proceedings at the Conference, see ante, p. 637 et seq.]

The PRESIDENT: While we have been in Harrogate quite a number of the members of the Society to whom I have spoken have made inquiries about where the next Conference is to be, and I thought perhaps it would be a suitable occasion this morning to tell you that the Conference of 1952 will be held at Eastbourne in the last week in September . . .

The next business of the Conference is the reception of the reports of the Chairmen of the five Committees which have met and, in accordance with the precedent, which I think is a good one, I propose to call on each of the Chairmen in turn to make his report according to the alphabetical order of the Committee concerned. The first is the report on the legal aid session by Mr. Eric Davies, the Vice-Chairman of the Legal Aid Committee, who presided in the absence of Sir Sydney Littlewood.

LEGAL AID COMMITTEE

Mr. ERIC DAVIES (London) read the following minutes:—

"About 200 members of the Society were present at the meeting and took part in a very interesting discussion on a wide variety of practical questions which have arisen during the course of the first year's working of the Legal Aid Scheme.

"The meeting first passed a resolution that the warm congratulations of the meeting upon his Knighthood be sent to Sir Sydney Littlewood together with an expression of their regret at his inability to be present.

"The Chairman opened by saying that he did not intend to deliver anything in the nature of an address upon the Legal Aid Scheme; that scheme had been in operation for approximately a year and he thought that everyone who had taken a part in its administration, whether as a member of an Area or a Local Committee or as a member of one or other of the panels under the scheme, was deserving of congratulation on the success which had attended their efforts; sufficient experience had been gained to show that there was nothing inherently wrong with the scheme itself. As had been expected, a number of comparatively minor points of difficulty had arisen and these were being dealt with where necessary by amendment of the Regulations or the Scheme or otherwise by Notes for Guidance on practical points. He expressed his view that the greatest advantage would be obtained from this meeting if those present would raise practical points of difficulty or interest which would enable the members of the Council present or others concerned in administrative positions under the Scheme to get an even closer knowledge and understanding of the practical problems which arose.

"Twenty-five members raised a variety of questions, some of them of considerable difficulty. Amongst the matters to which attention was directed by those who took part in the discussion were those relating to: (1) Proceedings by infants acting through next friends. (2) The action to be taken by Area Committees where an offer in settlement of an action was regarded as being reasonable by the conducting solicitor, and perhaps counsel, but the assisted litigant was not prepared to accept. (3) The practice and procedure of the solicitors in the Divorce Department. (4) The difficulty which arises where disbursements, such as process servers' fees, are disallowed in whole or in part on taxation. (5) The need for the rapid introduction of the advice provisions of the Act. (6) The steps to be taken to recover instalments of contributions and to enforce orders for costs or damages. (7) The desirability of Committees seeing the papers on both sides in proceedings where certificates are applied for both to bring and defend proceedings.

"Members also made practical suggestions for the amendment of Regulations or the Scheme in various minor respects, including the amendment of forms of application, and one member raised a very difficult question of practice in relation to the statutory charge in favour of The Law Society in the case of proceedings taken to redeem a mortgage secured on a house where the equity of redemption was very small.

"The Chairman concluded the meeting by expressing his thanks to all who had made constructive criticisms of the operation of the Scheme and gave his assurance that all the points raised would be taken into consideration by the Legal Aid Committee with a view, where necessary and if possible, to suitable provision being made by way of amendment to the Scheme or the Regulations to meet points of substantial difficulty."

The PRESIDENT: Ladies and Gentlemen, if nothing arises on that report I will call on Sir Leslie Farrer as Chairman of the Professional Purposes Committee.

Sir LESLIE FARRER (London) then read the following minutes:—

"The Chairman invited the meeting to discuss certain matters which the Committee thought to be of special importance to the profession. At the same time he welcomed questions on any other matters falling within the terms of reference of the Committee.

PROFESSIONAL PURPOSES

"The first particular matter raised was r. 3 of the Solicitors' Practice Rules, 1936, and the establishment of bonus schemes for unadmitted clerks. The Chairman referred the meeting to the statement of the Council's views on the conditions under which they would be prepared to grant a waiver of r. 3 which was published in the *Gazette* for January, 1949. The Council were very far from unwilling to grant waivers, but the rule was necessary to prevent abuses.

"The Chairman then referred to the problem which arose where a solicitor acted for employees of a client or for members of an association which was his client at reduced charges or for no charge. He referred to the judgment of the Lord Chief Justice in a recent case before the Divisional Court which had been fully set out in the *Gazette* for July, 1951. A somewhat kindred problem arose in connection with solicitors acting for clients who had come to them through Legal Advice Centres or Poor Man's Lawyers. It was recognised that many lawyers did a great deal of charitable work and the Council were most unwilling to put difficulties in their way; unfortunately, the possibility of abuse had made it necessary for the Council to lay down certain rules (which had been published in the *Gazette* for September, 1951) as to the conduct of such centres. It was explained that the National Council of Social Service had accepted these rules in the circumstances as being wholly reasonable; when the legal advice provisions of the Legal Aid and Advice Act, 1949, became operative the need for such centres would disappear.

"The meeting then considered certain aspects of advertising. The Chairman said that it was the general rule (to which there were exceptions) that where it was in the interest of the general public that a solicitor's description as such as well as his name and address should appear in a particular announcement there was no professional objection. What was or was not advertising was often a matter of degree.

"Certain members cited instances where local bank managers and managers of trustee departments and corporations had interviewed clients of solicitors and taken instructions from such clients without the solicitor being present. The Chairman pointed out that the principal banks had all agreed that it was desirable that solicitors should always receive their instructions directly from the clients themselves, and he thought it was only excess of zeal on the part of local managers when this did not happen. He invited members who had learned of specific instances to report them to the Council so that they could be taken up with the head office of the bank concerned. The meeting agreed that it was not unreasonable for a bank or a trustee corporation who were to be appointed trustees or executors of a will drawn by a solicitor to ask to see a draft of the will in question."

The PRESIDENT: Are there any questions on Sir Leslie Farrer's report? If not, I will now call on Mr. Charles Norton for his report on the Recruitment of Staff.

RECRUITMENT OF STAFF

Mr. CHARLES NORTON (London) read the following minutes:—

"The Chairman stated that the problem with which this Committee is concerned is twofold: first, how to recruit satisfactory material into the unadmitted ranks of the profession, and, second, once recruited, how to retain them. One of the major difficulties in recruiting staff was that, in contrast with employment in Government, local government or the nationalised industries, it was impossible for any newcomer

to know what his or her prospects in the profession might be. The Committee wished to discuss with the meeting whether it was practical or desirable to classify unadmitted staff in solicitors' offices in grades; to lay down any general scale of salaries for each such grade and to formulate other conditions of employment. The Chairman informed the meeting that the Committee had not as yet made any report to the Council, but had come to certain tentative decisions upon which he invited the views of the meeting. He stressed that it would be inappropriate for the Council to attempt to dictate any terms, as ultimately conditions of service were a matter between the employer and employee, but he believed it was desirable that there should be some definite information about the prospects available to those thinking of entering the profession and to those whose duty it was to advise such people.

"It was realised that the small firm and in particular the solicitor practising by himself had possibly even greater difficulties in recruiting and keeping staff than did the larger firm, but if the problem of recruiting staff was to be met, solicitors must realise that if they wanted good managing clerks they must be prepared to pay for them.

"After a long and interesting discussion on the grading of clerks, salaries, annual increments, holidays, bonus and pensions schemes and conditions of service generally the meeting seemed to be in favour of the direction in which the Committee was moving.

"Members were in favour of the incentive provided by bonuses, but were strongly opposed to any suggestion that r. 3 of the Solicitors' Practice Rules, 1936, should be modified so as to allow a commission to be paid to an unadmitted clerk on the introduction by him of business.

"The meeting agreed that the personal touch was of paramount importance in retaining staff; factors which help to produce an efficient and contented staff included clean and up-to-date offices and facilities for education both inside and outside the office.

"Time unfortunately precluded the discussion of other points which were on the agenda for the meeting, in particular the use of some possible alternative for the expressions 'clerk' and 'managing clerk,' and the provision of educational facilities.

"The Chairman expressed the hope that members who had not had the opportunity to speak at the meeting, or who wished to raise any other points, would communicate with the office, so that their views might be put before the Committee."

Retirement Benefits

The President: Next, I will call on Sir Edwin Herbert as Chairman of the Special Committee on Retirement Benefits.

Sir Edwin Herbert (London) read the following minutes:—

"About 120 members attended the meeting of this Committee, no less than twenty-four of whom contributed to the discussion. The Chairman outlined the problem, gave an account of the steps which The Law Society were taking to grapple with it, and mentioned three matters on which the Council were particularly anxious to have an expression of opinion from the members who were present.

"It was explained that what was at stake was no less than the continued existence of private practice, the problem being how a solicitor can at present rates of taxation save for old age, provide adequate working capital and make payments in respect of goodwill. These were three inter-related parts of the same problem. In the past the profession had become a profession open to the talented, as not only savings but also the provision of capital and of payments in respect of goodwill had customarily been made out of profits. It was now the case, however, that the possession of means was becoming more and more a vital consideration when choosing a junior partner because of the impossibility of meeting these commitments out of taxed income. This was contrary to public policy, unhealthy for the profession and had the result that young solicitors were increasingly seeking salaried and pensionable employment. The number of solicitors in private practice was virtually the same in 1951 as in 1939 and even in 1913 despite the enormous increase in legal work, and it was essential to make private practice more attractive to new entrants.

"As to the steps taken so far by The Law Society, the meeting was reminded that the setting up of the Second Millard Tucker Committee had been mainly due to a joint memorandum submitted by The Law Society and the Institute of Chartered Accountants in England and Wales to the Chancellor of the Exchequer. Discussions had taken place between The Law Society and other professional bodies before the Council had given any evidence to the Tucker Committee and there was a great degree of unanimity both as to the problem and as to the urgent need for tackling it. The Council had refrained from submitting any detailed retirement benefit scheme as they thought that it was essential that the principle that there should be some scheme must first be recognised and that discussions of detail should not delay such recognition.

"The three particular matters on which the Council wished to have the views of members present were: (*a*) the form and substance of any retirement pension scheme; (*b*) the problem of dealing with capital provision; and (*c*) the problem of dealing with goodwill.

"Most of the discussion was on retirement pension schemes, and it seemed to be the general view that, if a scheme for deferred annuities which kept as nearly as possible to the lines of approved pensions schemes for employees could be introduced this would go a considerable distance towards meeting the problem, and that the allied problems of capital and goodwill (though important) might as a result turn out to be much less acute, by reason of the freeing of funds at present earmarked for retirement. As to the form of any scheme, it was recognised that the amount of the contribution would probably have to be related to the amount of the solicitor's earnings, and that if the contributions were free of tax the benefits would have to be subject to tax; a scheme which primarily provided a capital sum on retirement would be unlikely to be accepted.

"Several members inquired whether any solicitor who was, say, over fifty years of age when a scheme came into force could afford to make the heavy contributions which would be necessary if he were to make provision for anything like an adequate pension. The suggestion was made that in order to meet this point such solicitors should be allowed to obtain tax relief on a higher percentage of their incomes. The analogy would be with the case of an employee entering a contributory pension scheme at a later age than the normal. In such a case it was a common practice for the employer to pay a sum into the pension fund in respect of that employee so as to put him in the same position on retirement as if he had joined the scheme at the normal age. Such payments by employers were allowed as deductions for income tax purposes over a period of years.

"As to the problem of capital provision, it was generally recognised that the amount of working capital required by a solicitor is considerable and that it was growing larger with the increase in overhead expenses. No solution, however, beyond the possibility mentioned in the Council's evidence to the Tucker Committee was advanced by members either to this problem or to the allied problem of goodwill. It was appreciated that there were certain firms where it had never been the practice to make any charge in respect of goodwill, and the ultimate solution, it was suggested, might be to abolish altogether the buying and selling of goodwill. Other speakers, however, felt that there was no reason why payments for goodwill should not continue, and all speakers agreed that, whatever might be done about goodwill in the future, provision should be made whereby in cases where partners had in the past contributed large sums, perhaps a considerable proportion of their life's savings, to the purchase of goodwill, they should be enabled to draw those sums out of the business on retirement. The general impression of the meeting was that they approved of the lines taken by The Law Society in the evidence they had submitted to the Millard Tucker Committee."

Scale Committee

The President: Does anyone wish to ask questions on Sir Edwin Herbert's report? If not, we come finally to the report of Mr. Roland Marshall, the Chairman of the Scale Committee.

Mr. R. Marshall (Liverpool) read the following minutes:—

"The Scale Committee held two sessions, both of which were well attended. At the first session the main topics discussed were the publication of Special Conditions of Sale when property is sold by auction, and the desirability of including a clause in The Law Society's Conditions of Sale which would have the effect of enabling a purchaser to sign a contract without having first to make local searches and preliminary enquiries.

"With regard to the publication of special conditions on sales by auction, it was agreed that the aim should be to give

THE
NATIONAL GUARANTEE
AND
SURETYSHIP ASSOCIATION
LTD.

(ESTABLISHED 1863)

THE ONLY BRITISH COMPANY TRANSACTING SURETYSHIP BUSINESS ALONE

The Association offers to the
LEGAL PROFESSION
a highly specialised service for dealing with
ADMINISTRATION
and all other Legal and Government
BONDS
★
INDEMNITIES
re
LOST DOCUMENTS, DEFECTIVE TITLES, RESTRICTIVE COVENANTS, MISSING BENEFICIARIES AND OTHER
CONTINGENCIES
ARRANGED

★

Head Office: **17 CHARLOTTE SQ., EDINBURGH**

London Office: **GRANVILLE HOUSE, ARUNDEL ST., STRAND, W.C.2**

Branches: BELFAST, BIRMINGHAM, BRISTOL, DUBLIN, GLASGOW, LEEDS, LIVERPOOL and MANCHESTER

THE ROYAL ASSOCIATION
In aid of the
DEAF AND DUMB

(FOUNDED 1840)
(Registered in accordance with the National Assistance Act, 1948)
PATRON: H.M. THE KING
President: The Archbishop of CANTERBURY

THE Society actually working amongst the Deaf and Dumb in London, Middlesex, Surrey, Essex and West Kent.

★ ***Legacy help is greatly valued***

Gifts gratefully acknowledged by Graham W. Simes, Secretary, R.A.D.D., 55 Norfolk Square, Paddington, W.2
(late of 413 Oxford Street, W.1)

NOT IN RECEIPT OF STATE AID

When things are difficult for families left behind at home, often only SSAFA can relieve hardship, and free the serviceman from desperate anxiety. Please ask your clients to remember SSAFA in their wills.

How's the missus, Lofty?

Who worries most—the wife back home in Lewisham . . . or the sailor on active service? Paradoxically, it's often the *serviceman* who has the greatest grounds for anxiety. It happens all too frequently. His wife is up against it—with children to care for (and another on the way), and prices for essential food and clothing rising continually. And then illness, or some other trouble comes . . .

These are the times when only SSAFA can help—to save the family from terrible hardship, and the serviceman from desperate anxiety. Whenever they are needed, SSAFA—the Soldiers', Sailors', and Airmen's Families Association—gives advice, help with food, clothing, furniture, child care, emergency funds. Servicemen rely on SSAFA; they know that it won't let their families suffer.

With more and more servicemen on active duty, calls on SSAFA for these urgent needs increase, and with them SSAFA's need for funds to finance them. You, in your professional capacity, have from time to time to advise clients with regard to the disposition of their property. You will be doing a great service to the nation if you urge them to bequeath a legacy to SSAFA.

help her to help herself...

'She is not seeking charity. We enable her to overcome her disability by training her to make artificial flowers. For this she receives official standard wages, which enable her to contribute towards her keep. The heavy cost of maintaining the home and workshops, however, is more than can be provided for by our crippled women.

We need the help of sympathetic souls to bridge this gap as well as to support our long-established work among needy children.

May we ask your help in bringing this old-established Charity to the notice of clients making Wills?

John Groom's Crippleage (Inc.)
37 SEKFORDE STREET, LONDON, E.C.1

John Groom's Crippleage is not State aided. It is registered in accordance with the National Assistance Act, 1948

intending purchasers a reasonable opportunity of knowing before bidding started what special conditions there were which affected the property. There was, however, a divergence of opinion on what constituted giving intending purchasers this opportunity. Some members took the view that the proper course was for the solicitor to read all the special conditions at the auction sale even if they had been available for inspection at the vendor's solicitor's offices beforehand and even if notice of their being available had been prominently displayed on the posters. Others were of opinion that the practice now adopted in Birmingham should become general and that, provided it was brought to the notice of intending purchasers by the sale bills that they could inspect the special conditions for a reasonable period prior to the auction, it was unnecessary for the vendor's solicitor to read the conditions at the auction sale. On a vote being taken as to whether it was desirable that the Birmingham practice should become general throughout the country, the motion was lost by a large majority.

"With regard to the inclusion of a clause in The Law Society's Conditions of Sale which would encourage vendors and purchasers to sign contracts without the delays caused by searches in Local Land Charges Registers, etc., members were reminded that a draft clause settled by counsel had been submitted to each of the Provincial Societies, who had been asked to state their views with regard to the draft clause. The meeting was informed that up to date about half of the Provincial Societies had replied, and that those who were for and against the proposal were very evenly divided. In the discussion which took place it was clear that the proposed new clause did not find general approval, although the principle that some method of avoiding the present delay in the completion of contracts was desirable was generally accepted. The Chairman intimated that the matter would be considered by the Council.

"Other matters mentioned or discussed included the proposal to extend compulsory registration of title to Surrey, solicitors' costs on mortgages to building societies, and whether it was possible to fix a local minimum scale at the full scale authorised by the Remuneration Orders. The members present expressed approval of the Council's decision that evidence should be given by a member of the Council at the forthcoming public inquiry into compulsory registration of title, at the request of the Provincial Societies in Surrey, and they agreed also that the ultimate aim as regards local minimum scales should be to raise the level of minimum scales as near to the maximum as possible, there being no objection in principle to making the maximum also the minimum.

"At the second session the topics discussed were the acceptance of solicitors' cheques on completion and mortgagors' solicitors' charges. It was generally agreed that solicitors acting for vendors should, in the interests of their clients, insist on either banker's drafts or cash on completion and that solicitors acting for purchasers should not ask vendors' solicitors to accept the purchasers' solicitors' cheques for the amount payable on completion. Where the purchaser is a local authority, it might be that as a matter of practice a cheque could be safely accepted.

"The Chairman stated that from time to time many inquiries were received about mortgagors' solicitors' charges in varying circumstances. He outlined the various circumstances which could obtain and stated the proper charge to be made in each case, and explained the effect of the Solicitors' Practice Rules and local minimum scales in cases where the solicitors concerned desired to reduce the scale fees. It was necessary to distinguish between the minimum charge which a solicitor could properly hold himself out as being prepared to make and the minimum charge which in fact he could properly make to an existing client. Members expressed the view that it would be helpful if the Chairman's summary could be reproduced either in the *Gazette* or in some other form which would make it readily available to the profession."

The PRESIDENT: Does anybody wish to ask any question on that report?

Mr. C. CURSHAM (Nottingham) said that his recollection was that, while the feeling of the meeting was generally against the Birmingham practice, it was left to Provincial Societies to adopt whichever practice they felt was desirable. He doubted whether that had been emphasised sufficiently in the report which had been read out.

Mr. MARSHALL said that, as he had stated in his report, many members did agree with the Birmingham system, but that there were others who quite clearly did not agree with it. The main point of contention was the question of whether the conditions should in fact be read at an auction. Although many members did agree with Birmingham, it was definitely the feeling of the meeting that it should be left to local law societies to deal with the matter as they thought best. The purpose of raising the point at the meeting had been to see whether there was any possibility of securing uniformity throughout the country, and the meeting had proved that it was not possible.

Mr. W. M. BAKER (Bristol) said that the idea that a clause should be included in The Law Society's Conditions of Sale to enable a purchaser to sign a contract without having made searches and inquiries beforehand had emanated from Bristol. If there were any Provincial Societies who were in support of the proposal he would like to suggest that they should exchange views with his Society in Bristol. He hoped that the proposal would be tested experimentally in Bristol over a period of twelve months, and he was sure that the co-operation of any other interested Societies would be of assistance.

[The meeting then concluded with the passing of a number of votes of thanks: see *ante*, pp. 640–641.]

BOOKS RECEIVED

Oke's Magisterial Formulist. Fourteenth Edition. By J. P. WILSON, Solicitor, Clerk to the Justices for the County Borough of Sunderland. 1951. pp. xxxv, 1057 and (Index) 111. London: Butterworth & Co., Ltd.; Shaw & Sons, Ltd. £5 5s. net.

Garsia's Law Relating to Conveyancing in a Nutshell. Third Edition. By BRYAN J. H. CLAUSON, B.A., of Corpus Christi College, Oxford, and of Lincoln's Inn, Barrister-at-Law. 1951. pp. viii and (with Index) 235. London: Sweet and Maxwell, Ltd. 8s. 6d. net.

The Formation and Annulment of Marriage. By JOSEPH JACKSON, M.A., LL.B. (Cantab.), LL.M. (Lond.), of the Middle Temple and South-Eastern Circuit, Barrister-at-Law. 1951. pp. xxvii and (with Index) 324. London: Sweet & Maxwell, Ltd. £2 2s. net.

Tolley's Complete Income Tax Chart-Manual, 1951-52. Thirty-sixth Edition. Compiled by KENNETH MINES, F.A.I.A., F.T.I.I., and L. E. FEAVER, A.S.A.A., F.C.I.S. 1951. pp. 105. London: Chas. H. Tolley & Co.; Waterlow & Sons, Ltd. 12s. 6d. net.

Tolley's 1951-52 Synopsis of Taxation in Eire. Twenty-seventh Edition. Compiled by KENNETH MINES, F.A.I.A., F.T.I.I., and L. E. FEAVER, A.S.A.A., F.C.I.S. 1951. pp. 14. London: Chas. H. Tolley & Co.; Waterlow & Sons, Ltd. 2s. 6d. net.

Tolley's Synopsis of Double Taxation Conventions with France and the Netherlands. Compiled by KENNETH MINES, F.A.I.A., F.T.I.I., and L. E. FEAVER, A.S.A.A., F.C.I.S. 1951. pp. 10. London: Chas. H. Tolley & Co.; Waterlow & Sons, Ltd. 4s. net.

The Profits Tax. Fifteenth Edition. Compiled by KENNETH MINES, F.A.I.A., F.T.I.I., and L. E. FEAVER, A.S.A.A., F.C.I.S. 1951. London: Chas. H. Tolley & Co.; Waterlow and Sons, Ltd. 4s. 6d. net.

Excess Profits Tax. Thirteenth Edition. Compiled by KENNETH MINES, F.A.I.A., F.T.I.I., and L. E. FEAVER, A.S.A.A., F.C.I.S. 1951. London: Chas. H. Tolley & Co.; Waterlow & Sons, Ltd. 3s. net.

An Outline of the Law of Trusts and Trustees. By H. A. R. J. WILSON, F.C.A., F.S.A.A., and C. N. BEATTIE, LL.B., Barrister-at-Law. 1951. pp. iv and (with Index) 59. London: H. F. L. (Publishers), Ltd. 5s. net.

The Lawyer's Remembrancer and Pocket Book, 1952. By ARTHUR POWELL, K.C. Revised and Edited for the year by J. W. WHITLOCK, M.A., LL.B. pp. 331 and Diary. London: Butterworth & Co., Ltd. 13s. 6d. net.

Wilson and Heaton on the Income Tax Act, 1945. First Supplement. By H. A. R. J. WILSON, F.C.A., F.S.A.A., and JAMES S. HEATON, A.S.A.A. 1950. pp. iv and (with Index) 94. London: H. F. L. (Publishers), Ltd. 5s. net.

NOTES OF CASES

COURT OF APPEAL

LEGAL AID: SUCCESSFUL AIDED PLAINTIFF: COSTS

Starkey *v.* Railway Executive

Cohen, Singleton and Morris, L.JJ. 17th October, 1951

Appeals from Stable, J.

The plaintiff, when a passenger in a train belonging to the Railway Executive, was injured when the train started while she was in the act of alighting at a station. In her action for damages for negligence she obtained judgment for £308, but Stable, J., refused to give her costs because she was an assisted person under the Legal Aid and Advice Act, 1949. He held that, as a matter of principle, a successful plaintiff who was in receipt of legal aid could not recover her costs from the unsuccessful defendant, but must recover them from the body which was financing her action. Plaintiff was given leave by Stable, J., to appeal on the question of costs, subject to the condition that The Law Society gave an undertaking to pay the costs of the appeal in any event. The Law Society did not give the undertaking. She now appealed with regard to costs, but also against the order imposing the condition of appeal.

COHEN, L.J., said that s. 1 (7) (*b*) of the Legal Aid and Advice Act, 1949, appeared to him to be conclusive in the plaintiff's favour on the question of costs. By that subsection "The rights conferred . . . on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised." The rule laid down by Stable, J., would mean that a wrongdoer would profit by the fact that a plaintiff was an assisted person, and that the burden which should fall on the wrongdoer would be transferred to the taxpayer. With regard to the condition attached to the leave to appeal, it seemed to him improper for Stable, J., to have asked for the undertaking of The Law Society in that form. At one time the Court of Appeal, in granting leave to appeal from their decisions to the House of Lords, required some such undertaking from the proposed appellant. But the House had pointed out that it was not proper for the Court of Appeal to seek to interfere with the discretion of the Law Lords as to costs on an appeal to them. So it seemed to the court here that the undertaking which Stable, J., sought to impose was an interference with their discretion as to costs on an appeal which would come before them. The utmost which he could have done was to require an undertaking that an application should not be made for costs, leaving it open to the Court of Appeal to make such order as they thought fit.

SINGLETON and MORRIS, L.JJ., agreed. Appeals allowed.

APPEARANCES: *Granville Sharp*, K.C., and *D. Fenwick* (*Clutton, Moore & Lavington*, for *Samuel Doberman & Richardson*, Middlesbrough); *J. M. McLusky* (*M. H. B. Gilmour*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

RENT RESTRICTION: MISTAKE CONCERNING STANDARD RENT

Dean *v.* Bruce

Somervell, Denning and Hodson, L.JJ.
25th October, 1951

Appeal from Judge Crosthwaite, sitting at Liverpool County Court.

In July, 1942, the plaintiff landlord let a shop and dwelling-house to the defendant at a rent of 14s. a week. He supplied to the tenant a rent book in which there was a statement of the standard rent of the premises, in accordance with s. 11 of the Rent, etc., Act, 1920; and the standard rent was there stated to be £36 8s. a year. In October, 1950, the landlord found that he had made a mistake and that in fact the standard rent of the premises was £60 a year. He then served notice on the tenant that the rent for the future would be £60 a year. The tenant refused to pay the increased rent, and claimed to remain in possession as statutory tenant at the old rent. The landlord then brought this action in the county court to recover the extra rent which he contended had become due. The county court judge held that the entry of the sum in the rent book constituted an estoppel so that nothing in excess of that sum could be recovered. The landlord appealed.

SOMERVELL, L.J., said that it was argued that the statement in the rent book that the standard rent was £36 8s. was one of the terms and conditions of the original tenancy within s. 15 (1) of the Act of 1920, and that the tenant was entitled to remain in possession on payment of that sum. But *Phillips* v. *Copping* [1935] 1 K.B. 15, showed that, on the tenant becoming a statutory tenant, the landlord was entitled to raise the rent to the correct standard rent. *Regional Properties, Ltd.* v. *Oxley* [1945] A.C. 347, showed that a statutory tenant could not claim the benefit of stipulations in the original contract of tenancy relating to the amount of rent payable. Any effect which the erroneous representation as to the standard rent might have had during the contractual tenancy was exhausted when it came to an end, and the statutory tenant must pay the true standard rent. The appeal therefore succeeded.

DENNING and HODSON, L.JJ., agreed. Appeal allowed.

APPEARANCES: *Morris Jones* (*Hyman Isaacs, Lewis & Mills*, for *Samuel Dean & Co.*, Liverpool); *G. Newman* (*I. Levin and Mannheim*, Liverpool).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DAMAGES: EFFECT OF PENSION AWARDED FOR INJURIES

Payne *v.* Railway Executive

Cohen, Birkett and Singleton, L.JJ.
26th October, 1951

Appeal from Sellers, J. (*ante*, p. 270; [1951] 1 T.L.R. 921).

In 1947 the plaintiff was called up for service in the Royal Navy. In April, 1948, while he was going home on leave, he was seriously injured in a railway accident and was granted a 100 per cent. disability pension of £2 5s. a week. He was now earning £4 14s. 6d. a week as a telephonist, and his total pension as a married man with a child was £2 16s. 3d. a week. In his claim against the defendants for damages for his injuries, the question calling for report was whether the pension should be taken into account in the computation of damages. Sellers, J., held, in the plaintiff's favour, that it should not. The defendants now appealed on that point. Sellers, J., awarded the plaintiff £2,500 for pain and suffering and £3,000 for loss of earning capacity. On the basis that the pension should be taken into account he would have awarded only £750 under the latter head. (*Cur. adv. vult.*)

COHEN, L.J., said that the point had not previously arisen in connection with a claim at common law for negligence, although it had arisen in relation to claims under the Fatal Accidents Acts. In *Johnson* v. *Hill* (1945), 61 T.L.R. 398, there was evidence, as there had been in the present case, that it was the practice of the Crown to take compensation awarded *aliunde* into account against a pension and to withhold or reduce the pension as it might think fit. A distinction existed between cases at common law and those under a statute. In his opinion, a service pension should be treated in the same way as an insurance policy. To allow it to be set off against damages would be to permit a wrongdoer to appropriate to himself the benefit of the party whom he had injured, and could not therefore be allowed. This conclusion was arrived at the more readily because the opposite one would put the Minister of Pensions into an impossible position: he would wish to avoid putting on the taxpayer a burden which should be discharged by the wrongdoer whose act caused the injury. On the other hand he would not wish to impose on the injured party a double deduction: (1) by the court in assessing the damages, and (2) by the Minister in adjusting the pension under the royal warrant.

SINGLETON, L.J., agreeing, said that pensions were formerly in the discretion of the Crown, but the position seemed to have been changed by the Pensions Appeal Tribunals Act, 1943, which gave a person to whom the award of a pension had been made a statutory right to receive it, though the Minister still had the power to vary or revoke the award, or to withhold, reduce or apply any payment under it in accordance with any provision of the royal warrant. The warrant now in force in respect of members of the armed forces gave the Minister power to reduce pensions in certain cases and the moneys which he was to take into consideration included any lump sum in respect of injury which was recoverable as damages at common law. It was thus clear that, where a person in the position of the plaintiff recovered damages for personal injury, it was the

duty of the Minister to reconsider the case, although it did not always follow that he was bound to reduce the pension.

BIRKETT, L.J., agreed. Appeal dismissed.

APPEARANCES: *Humfrey Edmunds* (*M. H. B. Gilmour*); *N. R. Fox-Andrews*, K.C., and *John Stephenson* (*Pennington and Son*, for *Lemon, Humphreys, Parker & Mather*, Swindon).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

WORKMAN'S FALL FROM LADDER: EMPLOYER'S DUTY

McCarthy *v.* Coldair, Ltd.

Denning and Hodson, L.JJ., and Vaisey, J.
1st November, 1951

Appeal from Jones, J.

The plaintiff was sent by his employers to the defendants' premises to do electrical work there on a Sunday. He was with a charge-hand employed at the premises, who took him to the spray-room to show him where the work had to be done. The place where the repairs were required was on top of a paint-booth, a structure some 6 feet 6 inches high. In order to reach the place, the charge-hand took a 10-foot ladder, inclined it at a proper angle against the paint-booth, climbed up on to the top of the booth and called to the plaintiff to follow him. While the plaintiff was on the ladder it slipped, and he fell, sustaining serious injury to his wrist. In his action for breach of duty at common law and under s. 26 (1) of the Factories Act, 1937, he was awarded by Jones, J., £2,750 damages. On the defendants' appeal the claim at common law was not pressed. By s. 26 (1) of the Act of 1937, "There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

DENNING, L.J., said that, on the claim under the Act of 1937, it had been argued that, being a penal statute, it should be interpreted strictly, and that the defendant occupiers of a factory ought not to be put in peril on an ambiguity. But "ambiguity" in that context did not mean every ambiguity which the ingenuity of counsel could devise, but only an ambiguity which the settled rules of interpretation failed to resolve. In *Harrison* v. *National Coal Board*, *ante*, p. 413 ([1951] 1 T.L.R. 1079, at p. 1083), Lord Porter said of the Coal Mines Act, 1911, that it was "also a remedial measure passed for the protection of the workman and must, therefore, be read so as to effect its object so far as the wording fairly and reasonably permits." He (Denning, L.J.) approached the construction of s. 26 (1) of the Act of 1937 with that passage in mind. The ladder constituted "access" from the floor of the factory to the top of the paint-booth. Was the ladder safe? "Safe" meant safe for all contingencies that might reasonably be foreseen, unlikely as well as likely, possible as well as probable. Judged by that standard, the ladder was not safe: it could have been foreseen that it might possibly slip, though it was not probable. It was absurd to suggest that, merely because ladders could possibly slip, employers must have a man posted at the foot of every ladder which was in use. That would throw a burden on industry disproportionate to the risk involved. In *Bolton* v. *Stone*, *ante*, p. 334 ([1951] 1 T.L.R. 977), though it was possible that a cricket ball might be hit out of a particular cricket ground, the House of Lords held that there was no negligence unless the degree of risk was comparable with the cost and difficulty of guarding against it. On whom should the burden fall of proving what was reasonably practicable? Generally no question of burden would arise in that connection because the relevant facts were equally available to both sides, and were investigated by both. But the view had been expressed *obiter* that, where the facts as to what could be done for safety were much more within the knowledge of the employer, the burden should be on him. Here the judge had found that the ladder, as a ladder, was safe, and that there was nothing wrong with the angle at which it was inclined. But he found that the floor was not an ordinary one, for example, of wood: the surface, although not dangerous, was smooth, and one on which a ladder might slip. It was, he found, "semi-glazed." The nature of that floor distinguished the present case from the ordinary case. He (his lordship) would not wish it to be thought that the law placed on employers the duty to post a man at the foot of a 10-foot ladder on an ordinary floor. But here the judge had had evidence on which he could find that the floor was a smooth one on which a ladder might have a marked tendency to slip. The charge-hand could have called someone to stand at the foot of the ladder while the plaintiff climbed it, or he could have placed something heavy against it. It was therefore impossible to interfere with the judge's finding that the defendants were in breach of their duty under s. 26 (1), and to that extent the appeal failed. In his (Denning, L.J.'s) opinion, however, the award of damages was too high, and should be reduced to £1,250.

HODSON, L.J., and VAISEY, J., agreed. Appeal dismissed on liability and allowed on damages.

APPEARANCES: *R. M. Everett* (*Ponsford & Devenish*); *F. W. Beney*, K.C., and *Humfrey Edmunds* (*Rowley Ashworth and Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

CONFLICT OF LAWS: DECEASED DOMICILED ABROAD: POWERS OF ENGLISH ADMINISTRATORS

***In re* Kehr; Martin *v.* Foges**

Danckwerts, J. 16th October, 1951

Adjourned summons.

The deceased, who had a German domicil of origin and died intestate in 1947 in India was, at the time of his death, domiciled in Germany. In 1950, letters of administration were granted in England with respect to his English estate and the plaintiffs as attorneys for his widow were appointed administrators. According to German law, which governed the devolution of his personal estate, the infant son of the deceased was entitled to three-quarters of the estate and the widow to the rest. The court was asked to determine whether there was power under the Trustee Act, 1925, or otherwise, to apply any part of the son's share for his maintenance while under twenty-one, or of the shares of either the widow or the son for his or her advancement.

DANCKWERTS, J., referring to *In re Wilks* [1935] Ch. 645, said that it was well established, on the one hand, that the devolution of personal property of a person dying domiciled abroad would be regulated by the law of the country of domicil, and, on the other hand, that the law of England regulated the administration of property situated in the United Kingdom; but the present case raised a difficult question which lay between those two considerations. All parties desired that trustees should be constituted in place of the plaintiffs and that they should apply the son's share for his maintenance during infancy; but the question was whether the court had jurisdiction. On the reasons which Farwell, J., gave in *In re Wilks*, *supra*, it was justifiable to conclude that s. 42 of the Administration of Estates Act, 1925, applied to the present case so that the personal representatives, although attorneys, had power to appoint trustees. The powers and constitution of such trustees depended upon the provisions of English law; there was, therefore, no reason why they should not have the powers of other trustees constituted according to English law, including the powers of maintaining infant beneficiaries and the powers of advancement conferred by the Trustee Act, 1925, ss. 31 and 32, respectively.

APPEARANCES: *J. A. Gibson*; *J. H. Lazarus*; *J. H. Boraston* (*Woodham, Smith, Borradaile & Martin*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

ADOPTION: APPLICANT LIVING ABROAD: MEANING OF "RESIDENCE"

***In re* An Adoption Application (No. 52 of 1951)**

Harman, J. 17th October, 1951

Adjourned summons.

A married couple applied to adopt a child; they lived in Nigeria but returned to this country for the periods of the husband's leave, which was about three months every fifteen months; after the expiration of his engagement abroad, viz., after approximately seven years, they intended to return to this country permanently. They had the care of a child for three months during their stay in England on occasion of the husband's leave and after that period applied to the court for leave to adopt the child; before the application was heard, the husband had to return to Nigeria and did not pursue his application, but the wife continued to stay within the jurisdiction and intended to join her husband with the child as soon as the order for adoption was granted.

HARMAN, J., said that the Adoption Act, 1950, s. 2 (5), made the residence of the adopter in England (or Scotland) a pre-requisite to the making of the adoption order. Although for

the purposes of other Acts, such as the Income Tax Acts, it was undoubtedly possible for a person to be resident in two places, the distinction drawn throughout the Act of 1950 between residence in England and residence abroad, as being the converse one of the other, made it difficult to suppose that that was so in this Act. In *In re W* (1946) (not reported), Evershed, J. (as he then was), made an order in favour of the wife of a colonial servant serving in Africa. The practice which developed from that was that an order would be made if the applicant were physically within the borders of the country at the moment of the making of the order. He (the learned judge) did not accept the interpretation of " residence " which underlay that practice. It would be dangerous to attempt to define what was meant by the word " reside," for it was in every case a question of fact. Here it was clear that the applicant was not resident in this country, but in Nigeria ; she was merely a sojourner here during a period of leave though both the husband and wife might be resident hereafter. Consequently there was no jurisdiction to make an order in favour of either applicant.

APPEARANCES : *D. B. Buckley* (*Boulton, Sons & Sandeman*) ; *W. F. Waite* (*the Official Receiver*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.

KING'S BENCH DIVISION

DIVISIONAL COURT

DRIVING UNDER INFLUENCE OF DRINK : GRAVITY OF OFFENCE

Hallett *v.* Newton

Lord Goddard, C.J., Hilbery and Pilcher, JJ.
12th October, 1951

Case stated by a stipendiary magistrate.

The defendant admitted driving a motor car while under the influence of drink and had been fined £5. The case is reported only for the following observations made by Lord Goddard, C.J.

LORD GODDARD, C.J., said that the case was not stated on the question of the amount of the fine, for unfortunately the court had no powers to increase the sentence imposed by a magistrate unless it was less than the minimum sentence prescribed. He could not understand how, for the offence of driving under the influence of drink, a court could consider that a fine of £5, whatever the station in life of the driver, could be an adequate penalty. He wished to say in court what he had said for eighteen months to justices all over England, namely, that driving under the influence of drink was one of the worst offences which it was possible to commit. A motor car in the hands of a man under such an influence was a most dangerous instrument, and the driver was placing the lives of His Majesty's subjects in peril. It must never be considered in mitigation that no one was injured. If someone were, the driver could be charged with another offence. The offence consisted of doing a dangerous and wicked thing which placed other people in danger and the question that magistrates should ask themselves in such cases was whether any reason existed why the offender should not be sent to prison. He was convinced that the terrible toll on the roads would go on until magistrates and justices passed really severe sentences for this most grave crime. Drunken drivers were as great a menace as a mad dog, and ought to receive severe sentences.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law]

" SPECIAL REASONS " : PROCEDURE

Jones *v.* English

Lord Goddard, C.J., Hilbery and Slade, JJ.
17th October, 1951

Case stated by Essex justices.

The defendant was discovered under the influence of drink in his motor lorry, which was unlit though it was after lighting-up time. The vehicle was in a side-road to which it had been towed after it had broken down. It was not in a condition to be driven when the defendant was found in it. He had taken some drink after the lorry had been left by the towing vehicle, and had then gone to sleep in it as he did not think that it ought to be left unattended. He pleaded guilty to an information in which it was alleged that he was drunk in charge of the vehicle. The facts on which he relied as constituting special reasons why he should not be disqualified for holding a driving licence were stated to the justices by his legal representative without objection by the prosecutor, who advanced no contentions on the question of special reasons. The justices held that the facts stated did constitute special reasons for not disqualifying the defendant. The prosecutor appealed.

LORD GODDARD, C.J., said that there was evidence on which the justices might properly refrain from imposing disqualification. This, like *Jowett-Shooter* v. *Franklin* (1949), 65 T.L.R. 756, was not a case where the defendant, though charged with being in charge of the vehicle while under the influence of drink, must at some stage have driven it while in that condition.

With regard to the procedure which had been adopted here, where a defendant was convicted, either on a plea of guilty or after evidence had been heard, of any offence for which the Road Traffic Act, 1930, imposed the penalty of disqualification, then, if the defendant wished to adduce special reasons why he should not be disqualified, he should be required to support them by evidence, for the burden of proving special reasons was on him. The justices should not be content with mere statements of fact even if assented to by the prosecution.

HILBERY and SLADE, JJ., agreed. Appeal dismissed.

APPEARANCES : *R. M. O. Havers* (*Solicitor, Metropolitan Police*) ; *D. J. L. Fitzgerald* (*J. H. Fellowes*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

EXCISE DUTY : ROAD CONSTRUCTION VEHICLES

McCrone *v.* J. & L. Rigby (Wigan), Ltd.
Same *v.* Same

Lord Goddard, C.J., Hilbery and Slade, JJ.
19th October, 1951

Case stated by Lancashire justices.

The defendants, engineering contractors, were excavating a trench along a public highway for the laying of a sewer. The excavated soil was carried away and dumped in a field farther along the road by means of a vehicle called a dumper. The vehicle had four tyred wheels, and consisted of an engine, a driver's seat, and, in front, a steel skip which tipped forward for the dumping of its contents. No excise licence was in force in respect of the vehicle. No construction or repair work was being done to the road apart from the excavation of the trench. The contractors were also using in the work a Bucyrus excavator, being a vehicle propelled by means of caterpillar tracks and fitted with mechanically operated iron or steel buckets for digging and shovelling earth. The driver from his seat could control the movements both of the digging appliances and of the vehicle itself. On informations charging the defendants with contravening s. 15 of the Vehicles (Excise) Act, 1949, in that no excise licence had been obtained for the vehicles, the justices held that both vehicles were exempt under s. 7 (1) (*h*) as being road construction vehicles. The prosecutor appealed. Section 1 of the Act imposes excise duty on " mechanically propelled vehicles used on public roads." By s. 7 (1) " No duty shall be chargeable . . . in respect of . . . (*h*) road construction vehicles . . . used for no purpose other than the construction or repair of roads at the public expense." By s. 22 " if in any proceedings " under, *inter alia*, s. 15 (1), " any question arises . . . (*d*) as to the purpose for which any mechanically propelled vehicle has been used, the burden of proof in respect of the matter in question shall be on the defendant." By s. 4 (1) duty is specifically made chargeable under Sched. III of the Act on certain vehicles, in particular, " vehicles . . . constructed and used for . . . trench digging or any kind of excavating or shovelling work which (1) are used on public roads only for that purpose. . . ."

SLADE, J., giving judgment with regard to the dumper, said that it was a mechanically propelled vehicle within the scope of the Act of 1949. That Act did not contain the qualification in the Road Traffic Act, 1930, that a mechanically propelled vehicle, to come within the latter Act, must be " intended or adapted for use on roads." In that respect *MacDonald* v. *Carmichael* [1941] S.C. 27 was distinguishable. There was no ground for holding that in the circumstances the dumper had not been used on the road (s. 1 of the Act of 1949) in view of the justices' finding that it had in fact been driven along the public road to the dumping ground. But the real point in the case was that the condition of exemption under s. 7 (1) (*h*) that the vehicle was used " for no purpose other than the construction of roads " was not satisfied by proving merely that on the occasion in question it was used only for that purpose. Therefore the defendant contractors had failed to discharge the burden imposed on them by s. 22. Duty was accordingly payable in respect of the vehicle, and the appeal succeeded.

HILBERY, J., agreed.

LORD GODDARD, C.J., said that he reserved his opinion on the question whether the removal of spoil from a trench being dug in a road constitutes the "construction or repair of roads." Giving judgment on the other information, Lord Goddard, C.J., said that the appeal succeeded on the short ground that the excavator could not be exempt under s. 7 (1) (*h*) because it was specifically made taxable by s. 4 (1).

HILBERY and SLADE, JJ., agreed. Appeals allowed.

APPEARANCES: *E. E. Youds* (*Norton, Rose, Greenwell & Co.*, for *Sir Robert Adcock*, Preston); *G. J. Bean* (*Pritchard, Englefield and Co.*, for *Swift, Garner & Hall*, St. Helens).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

POOL BETTING DUTY: BASIS OF ASSESSMENT

Commissioners of Customs and Excise *v.* Pools Finance (1937), Ltd.

McNair, J. 24th October, 1951

Action.

The defendant pool promoters employed a collector who issued pool betting coupons to his clients, received them filled in and forwarded them to the defendants. He remitted to the promoters 14s. 6d. in the £ of the amount of bets made by clients, whether they paid him or not, the balance being his remuneration, though he had himself to bear bad debts. By s. 6 (1) of the Finance (No. 2) Act, 1947: "There shall be charged on all bets made by way of pool betting . . . a duty of excise, to be known as the pool betting duty, equal to 10 per cent. of the amount of the stake money paid," the duty being payable by the promoters. By subs. (5): "Bets shall be deemed for the purposes of this section . . . to be made by way of pool betting whenever a number of persons make bets on terms that the winnings of such of those persons as are winners shall be, or be a share of, or be determined by reference to, the stake money paid or agreed to be paid by those persons . . ." The commissioners claimed a declaration to the effect that the defendant promoters were chargeable with pool betting duty in respect of the bets made, calculated on the total amount received by the collector from his clients. The defendants contended that duty was to be calculated on the amount actually paid by the collector to the defendants.

MCNAIR, J., said that the facts made it clear that the relationship between the promoters and the collector was that of principal and agent, the only special feature about the relationship being that the collector was bound to account to his principal not for the actual amount received by him but for the amount of the bets placed with him less his commission. Another way of putting it was that the collector guaranteed the solvency of his clients to the promoters. The latter had made various rules to govern the sending in and acceptance of these coupons, and the basic rule was that it should not be attended by legal rights and duties but should be binding in honour only. The claim was based on such decisions as *Rose and Frank Co.* v. *Crompton and Brothers, Ltd.* [1925] A.C. 445, where, with reference to a similar case, it was said that the overriding clause in a document was that which provided that it was to be a contract of honour only and unenforceable at law. In view of that basic rule it seemed impossible to say that anything in the rules could, as between the parties to the present action, affect the legal relationship between the promoters and the collector. To apply the facts of the present case to the charging section of the Act of 1947, it was plain that the amount of the stake money which was subject to the duty of 10 per cent was the stake money paid by the various clients to the collector; and that construction seemed to be consistent with the definition in s. 6 (5) of the phrase "bets made by way of pool betting," the factor determining the amount of a person's winnings was the stake money which he had agreed to pay the collector. The commissioners were entitled to the declaration which they claimed.

APPEARANCES: *J. P. Ashworth* (*Solicitor of Customs and Excise*); *Gilbert Beyfus*, K.C., and *Donald McIntyre* (*Gregory, Rowcliffe and Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF CRIMINAL APPEAL

PROCEDURE: DIRECTION

R. *v.* Mayo

Lord Goddard, C.J., Slade and Devlin, JJ. 22nd October, 1951

Section 22 (1) of the Criminal Justice Act, 1948, provides: "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(*a*) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (*b*) has been previously convicted of an offence for which he was sentenced to corrective training, the court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless . . . it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section."

LORD GODDARD, C.J., gave the following direction of the court: Where a court refrains from making an order under s. 22 (1), of the Act of 1948 in a case to which the section will apply unless the court exercises a discretion to the contrary, the Court of Criminal Appeal desire to repeat that the court should state in terms that it has exercised this discretion. It would also be of assistance if the grounds which have moved it so to do were briefly stated. Where there is an appeal against sentence, the Court of Criminal Appeal may be left in doubt whether the absence of the order was due to inadvertence or was deliberate.

(See *R.* v. *Keeler* (1949), 93 SOL. J. 743; 65 T.L.R. 703.)

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COMMON-LAW MISDEMEANOURS: SENTENCE

R. *v.* Higgins

Lord Goddard, C.J., Hilbery and Pilcher, JJ. 8th October, 1951

Appeal against sentence.

The appellant was sentenced to three years' imprisonment at Hertfordshire Quarter Sessions on conviction of attempted housebreaking. He appealed against that sentence. (*Cur. adv. vult.*)

LORD GODDARD, C.J., giving a judgment of the court in amplification of the judgment in *R.* v. *Morris* [1950] 1 K.B. 394; 94 SOL. J. 708, said that in giving leave to appeal against sentence the court had said that the charge on which the appellant was convicted was a common-law misdemeanour for which, normally, the maximum penalty was two years' imprisonment; but the court thought that, having regard to the fact that a question of law might be involved, he should have leave to appeal. At the hearing counsel for the appellant did not contend that the sentence was one which could not be lawfully passed, rightly conceding, as the court thought, that the matter was concluded by *R.* v. *Morris, supra*, which laid down that the law was, and always had been, that for a common-law misdemeanour the court could sentence to imprisonment or fine at discretion, provided that the sentences were not inordinate. It was unnecessary to restate at length the reasons for that judgment but in case there should be any doubt or misunderstanding with regard to attempts to commit felonies or misdemeanours, they would expand the judgment in *R.* v. *Morris, supra*, in that respect. Attempts to commit crime were common-law misdemeanours, but, in six cases, statutes had expressly dealt with attempts, thereby making them statutory offences, and had provided maximum punishments. All other attempts were misdemeanours at common law which were punishable only by simple imprisonment until certain statutory provisions enabled the punishment of hard labour to be added. Imprisonment with hard labour could only have been imposed under statutory authority. The first of the Acts authorising that punishment was the Hard Labour Act, 1822, and among the offences for which hard labour could be imposed was an attempt to commit a felony. Certain other offences were added by the Criminal Procedure Act, 1851, and there had been other statutes creating offences for which imprisonment with hard labour could be awarded. In 1891 the Penal Servitude Act was passed, which by s. 1 (2), provided: "Where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour." It was that Act, as was pointed out in *R.* v. *Morris, supra*, which enabled the court to mitigate sentences for offences for which penal servitude, perhaps for seven or fourteen years, or even for life, could be given, by passing a sentence of imprisonment for two years. Section 16 (1) of the Criminal Justice Administration Act, 1914, provided: "Where a person convicted by or before any court of an offence is sentenced to imprisonment without the option of a fine, the imprisonment may, in the discretion of the court, be either with or without hard labour, notwithstanding that the offence is an offence at common law or that the statute under which the sentence is passed does not authorise the imposition of hard labour or requires the imposition of hard labour."

But, as was also pointed out in *R.* v. *Morris, supra*, the law with regard to common-law misdemeanours remained the same, except that under the Act of 1914 hard labour could be imposed for a common-law offence, but the limitation of two years was to be found only in the Penal Servitude Act where the court passed a sentence of imprisonment instead of one of penal servitude; for, if the offence were one punishable with penal servitude, and the court thought fit to pass it, it had to impose a sentence of not less than three years. An attempt to commit a crime, except in the case of those dealt with in the statutes to which he had referred, was never punishable with penal servitude, and, therefore, the provisions of the Penal Servitude Act did not apply. It was very largely because of that Act that the idea became general that no sentence of imprisonment could exceed two years, and they (their lordships) did not suppose that, at any rate in modern times, any sentence was ever passed of imprisonment with hard labour for a period in excess of two years. Penal servitude and imprisonment with hard labour were now abolished, and accordingly there was now no reason why a court should not impose a longer sentence of imprisonment than two years except in cases where the period was limited by the statute creating the offence to two years or less. It might well be that a court would consider that a more severe sentence than two years should be imposed on a man with a long record of crime who was attempting to commit, for example, a felony such as housebreaking or burglary, for which he would be liable, perhaps, to imprisonment for life, and had failed merely because he was disturbed during his attempt, or for some other reason was unable to effect his purpose. At the same time the court thought that a sentence exceeding two years for a common-law misdemeanour should be imposed only in serious cases, well illustrated by *R.* v. *Morris, supra*, or, where the misdemeanour was an attempt to commit a crime, where the convicted person was one who, if he had achieved his end, would obviously have received a severe sentence. In the present case not only did quarter sessions not exceed their powers, but the Court of Criminal Appeal could well understand that sessions should exercise those powers on a man of forty-one years who had had six convictions. But by reason of certain facts which were brought to the attention of the Court of Criminal Appeal, and of the fact that the appellant had only once been sent to prison, and then only for twelve months, and that he had been for a year out of trouble, the court, with some hesitation, decided to reduce the sentence and substitute one of twenty-one months' imprisonment. To that extent the appeal succeeded. Sentence varied.

APPEARANCES: *C. Lea* (*Registrar, C.C.A.*); *Edward Clarke* (*D.P.P.*)

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Boot and Shoe Repairing Wages Council (Great Britain) Wages Regulation Order, 1951. (S.I. 1951 No. 1867.)

Reserve and Auxiliary Forces (Notification of Standard Rent) (Scotland) Regulations, 1951. (S.I. 1951 No. 1879 (S.95).)

Retail Bespoke Tailoring Wages Council (England and Wales) Wages Regulation (Amendment) Order, 1951. (S.I. 1951 No. 1870.)

Schools Grant Amending Regulations No. 1, 1951. (S.I. 1951 No. 1882.)

Stopping up of Highways (Bootle) (No. 1) Order, 1951. (S.I. 1951 No. 1873.)

Stopping up of Highways (Lancashire) (No. 4) Order, 1951. (S.I. 1951 No. 1872.)

Stopping up of Highways (London) (No. 22) Order, 1951. (S.I. 1951 No. 1874.)

Stopping up of Highways (London) (No. 23) Order, 1951. (S.I. 1951 No. 1875.)

Stopping up of Highways (London) (No. 24) Order, 1951. (S.I. 1951 No. 1876.)

Stopping up of Highways (North Riding of Yorkshire) (No. 2) Order, 1951. (S.I. 1951 No. 1871.)

OBITUARY

MR. W. S. ANDREW

Mr. William Stobo Andrew, solicitor, of Swansea, died on 29th October, aged 77. Admitted in 1897, he was a past-president of Swansea Law Society.

MR. E. M. CALVERT

Mr. Edwin Montagu Calvert, solicitor, of Norwich, died on 14th October, aged 87. Admitted in 1888, he was a past president of the Norfolk and Norwich Law Society. He was clerk to the Limpenhoe and Reedham Drainage Board, to the Lower Yare Fourth Internal Drainage Board and to the Commissioners for the Eastern Hundreds of Norfolk, and honorary solicitor to the Norwich Institution for the Blind, to Kelling Sanatorium and to the former Norfolk and Norwich Staff of Nurses.

SIR SIDNEY CLIFT

Sir Sidney William Clift, president of the Cinematograph Exhibitors' Association in 1944, who died on 19th October last, was admitted a solicitor in 1912. He was knighted in 1947.

MR. E. C. DAINTREY

Mr. Ernest Charles Daintrey, solicitor, of Essex Street, Strand, died on 23rd October, aged 88. He was admitted in 1885.

MR. J. T. GREEN

Mr. John Tindell Green, retired solicitor, of Sunderland, has died at Harrogate, aged 94. Admitted in 1880, he was president of the Sunderland Law Society in 1903, and was the oldest practising solicitor in Sunderland when he retired in 1948.

MR. F. J. HALL

Mr. Frederic John Hall, solicitor, of Hythe, died on 8th October, aged 65. He was admitted in 1910 and had been deputy mayor of Hythe.

MR. W. J. ORTON

Mr. William John Orton, solicitor, of Leamington, died recently. He was admitted in 1920.

MR. E. W. HAMMOND

Mr. Edgar Watkin Hammond, solicitor, of Pontypridd, died on 30th October at the age of 61. He was admitted in 1913, and was at one time president of the Pontypridd, Rhondda and District Law Society.

SIR NAZEBY HARRINGTON

Sir Henry Nazeby Harrington, solicitor to the Board of Customs and Excise, died on 31st October, aged 60. He was admitted in 1920 and entered the Customs and Excise service as a legal clerk. He was knighted in 1947.

MR. T. O. L. HAWTHORNE

Mr. Thomas Oliver Leslie Hawthorne, solicitor, of Reading, has died at the age of 56. Admitted in 1923, he had been deputy coroner for the county borough, and was the honorary solicitor to, and a member of the executive committee of, the Council of Social Service.

MR. W. R. HUGHES

Mr. William Richard Hughes, solicitor, of Caernarvon, died on 15th October, aged 72. He had been registrar of the County Courts of Caernarvon, Bangor and Anglesea and district registrar of the High Courts of Caernarvon and Bangor since 1928. In 1944 he also took over the county courts of Conway, Colwyn Bay, Llandudno and Llanrwst. He was formerly police prosecuting solicitor for the Caernarvon division and clerk to Gwyrfai Rural Council. He was to have retired at the end of November.

MR. N. R. SWORDER

Mr. Neville Robert Sworder, former Registrar of Watford County Court, died on 7th October.

MR. J. W. WHITEHEAD

Mr. John William Whitehead, managing clerk to Messrs. Moxons, of Hanley, for fifty-two years, died on 7th October. He retired in May, 1949.

POINTS IN PRACTICE

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 102-103 Fetter Lane, E.C.4, and contain the name and address of the subscriber, and a stamped addressed envelope.

Conveyance of House to Mother Jointly with Son

Q. In April, 1950, E, a widow, agreed to purchase a house for £1,350. The money was provided as to £950 by E herself and as to £400 by a mortgage to a building society. With E lived her son J, and in order, as she says, to give him some security, she instructed her solicitors to have the house conveyed to herself and her son as joint tenants in the usual manner. The mortgage subscriptions, rates, etc., have since the conveyance been paid by the mother out of her own income, part of which is provided by payments by the son for board. The mortgage is in joint names. The son has now left home and refuses to sign a conveyance of his interest in the house to the mother. E wishes to know whether there is any means by which she can claim the whole of the interest in the house or whether there is bound to be a presumption of a gift of a part interest in it to the son. No notice of severance has so far been served.

A. It has been decided (*Re De Visme* (1863), 2 De G.J. & S. 17; *Bennet* v. *Bennet* (1879), 10 Ch. D. 474) that where a mother buys property in the name of her child there is no presumption of advancement as in the case of a purchase by a father, since equity imposes no duty on the mother to make provision for the child. It has even been held in an old case (*Stileman* v. *Ashdown* (1742), 2 Atk. 477) that where a father directs the conveyance of property to be taken in the joint names of himself and his son no advancement is to be presumed. We are, therefore, of the opinion that E can compel J to convey to her his interest.

Easement—Right to have Fence Maintained

Q. A tenant farmer rents land adjoining the grounds of a hall owned and occupied by the landlord. The hall grounds contain yew trees, and one of the farmer's cattle entered the grounds through a hole in the hedge and died from yew poisoning. The landlord carries on a boys' school at the hall, and evidence is available that the boys had removed some railings out of the fence so that the cattle were able to stray into the hall grounds. The tenancy agreement contains no reference to the fencing of the hall grounds, so the tenant is presumably liable to fence against his own stock. The farm has been rented by the tenant's family for some sixty years and the landlord has always maintained the fence surrounding the hall grounds, but the ownership of the property has changed recently. Despite the decision in *Cheater* v. *Cater* [1918] 1 K.B. 247, has the tenant any claim for the loss of his cow by reason of the fact that the landlord has always maintained the fence, that damage had been done to the fence by the landlord's pupils or otherwise?

A. We do not think *Cheater* v. *Cater* has any relevance to the circumstances quoted. It was a case where the landlord's yew trees *overhung* the demised land, and the tenant was held to "take the land as he found it," i.e., overhanging poisonous yews and all. The real question here is: is there an easement of fencing now vested in the tenant? A right to have a neighbour repair fences can exist as a "spurious easement" (*Lawrence* v. *Jenkins* (1873), L.R. 8 Q.B. 274, at p. 279), and could be acquired under the doctrine of lost modern grant by user of twenty years or more (*Boyle* v. *Tamlyn* (1827), 6 B. & C. 329). Unfortunately, however, such easement can only be thus acquired by one fee simple owner against another and it would, therefore, seem that the tenant must keep his cattle in.

Sale of Abandoned Lorry

Q. Our client is the owner of a garage, and in 1945 a van was brought in for repair after extensive damage through a collision. The owner of the van disappeared, but the repairs were completed about three years ago and the present value of the van is about £130. The amount due for repairs would be over £80, and the charge for storage in addition would amount to most of the value of £130. The owner having made no claim or sent any communication since 1945, is the garage proprietor entitled to take steps for disposal of the van?

A. The short answer is: No. In *Munro* v. *Willmott* [1948] 2 All E.R. 983, a car was left for three years in an inn yard. The licensee sold it and was held liable in detinue and in conversion for the value of the car. The garage owner could only lawfully dispose of the van in circumstances of emergency, when he becomes an agent of necessity for the owner. See also *Sachs* v. *Miklos* [1948] 1 All E.R. 67.

Sale of Glebe Land—Evidence of Compliance with Formalities

Q. We act for the purchasers of a single house, the site of which formerly formed part of glebe land. On the sale of the glebe by the then vicar in 1937 the consent of the Minister of Agriculture and Fisheries was obtained and he also gave a receipt for the purchase money. Copies of both these last-mentioned documents are abstracted. Are we concerned for our clients to be satisfied that all the requirements of the Glebe Lands Act, 1888 (as amended), and the Sale of Glebe Land Rules, 1927, were complied with? What we have in mind are such matters as notices to bishop, patron, parishioners, etc., prior to the sale.

A. Under the Sale of Glebe Land Rules, 1927, the Minister of Agriculture and Fisheries is required to be satisfied as to the due service of the appropriate notices and the observance of the other preliminary requirements before giving his authority for the sale. We accordingly consider that production of the instrument containing the Minister's approval is at least *prima facie* evidence that the requirements preliminary to sale have been complied with, and that the service of the necessary notices need not be enquired into by a purchaser unless he has notice of some irregularity which would put him upon enquiry. In our opinion, a purchaser will, in the absence of any such notice of irregularity, obtain a perfectly good title if he examines the instrument approving the sale (and takes up the document if it relates solely to the property now being sold) and sees that any conditions laid down in the instrument have been complied with.

Stamp Duty—Declaration of Trust Creating Life Interest

Q. In September, 1945, J purchased a leasehold residence at a cost of £12,000 and it was transferred on the Land Registry into his name in the usual way. He now enquires whether he can make some disposition of it for the benefit of his wife or children with the object of avoiding the payment of death duties. In an article at 93 Sol. J. 78, dealing with dispositions made for the purpose of avoiding death duties, one of the ways suggested was that any house purchased as a residence for husband and wife should be conveyed into their joint names to be held on trust for sale, the income from the proceeds of sale to be paid to the wife during her life and on her death the latter to fall into the estate of the husband. J would like to take advantage of this method of saving duty, but the question arises as to what stamp duty will be payable on the necessary disposition. If the house had been transferred when it was purchased to J and his wife in the way suggested above, then the only stamp duty would have been 2 per cent. on the purchase price (which was in fact paid when J purchased the property) and no further stamp duty would have been payable in respect of the settlement of the proceeds of sale. It is suggested that J might now execute a declaration of trust of the property whereby he would hold it upon similar trusts to those mentioned above and then by the same deed appoint his wife as a new trustee jointly with him of the settled property. The question then arises as to what stamp duty will be payable on this document. Will (1) *ad valorem* stamp duty as on a gift *inter vivos* be payable or (2) will the only stamp duty be 10s. in respect of the declaration of trust and a further 10s. in respect of the appointment of a new trustee, or (3) will settlement duty at the rate of 5s. per cent. be payable?

A. To the extent that the proposed declaration of trust creates an interest in favour of the wife it seems that it will be a voluntary settlement or disposition in her favour and that accordingly *ad valorem* duty at 2 per cent. will be payable on the value of the wife's life interest plus 10s. in respect of the appointment of the wife as the new trustee (Finance (1909–10) Act, 1910, s. 74 (5)). There does not appear to be a decision exactly in point, but in *West London Syndicate* v. *Commissioners of Inland Revenue* [1898] 1 Q.B. 226; 2 Q.B. 507, it was held that a declaration of trust which operated as a sale attracted *ad valorem* duty, and the principle would appear to be the same. The decision in *Stanyforth* v. *Commissioners of Inland Revenue* [1930] A.C. 339, where it was held that the reservation of a power of revocation reduced the element of gift to a nominal figure, does not assist in the present case since to reserve a power to revoke would defeat the purpose of saving death duties.

NOTES AND NEWS

Honours and Appointments

Mr. WILLIAM ARTHIAN DAVIES, K.C., has been appointed deputy chairman of the Court of Quarter Sessions of the County of Buckingham.

Mr. TEGID OWEN JONES has been appointed assistant solicitor with the Batley Borough Council.

Mr. MAURICE H. PUGH has been appointed chairman of the Transport Users' Consultative Committee for the South-East Area.

Mr. M. L. ROTHFIELD, senior assistant solicitor to South Shields Corporation, has been appointed town clerk of Jarrow.

The Lord Chancellor has appointed Mr. GWILYM LLEWELLYN Registrar of Bangor, Caernarvon, Conway, Llandudno and Colwyn Bay, Llangefni, Holyhead and Menai Bridge and Llanrwst County Courts and District Registrar in the District Registries of the High Court of Justice in Bangor and Caernarvon as from the 1st November, 1951, in place of Mr. W. R. Hughes (deceased).

Personal Notes

Mr. O. Lloyd Matthews, assistant solicitor to Caernarvonshire County Council, was married on 18th October to Miss Mena Parry, of Bethel, Caernarvon.

Mr. E. C. Francis, West Cheshire Deputy Coroner since 1944, has announced his resignation in order that he can devote more time to his practice as a solicitor in Chester. Mr. Francis is also solicitor to the West Cheshire Water Board.

Miscellaneous

Of ninety-three candidates at The Law Society's Preliminary Examination held on 8th–11th October, 1951, thirty-five were successful.

Mr. H. A. Close, legal adviser to the National Federation of Building Trades Employers, will lecture on "The Evolution of the R.I.B.A. Form of Contract" at a general meeting of members of the Royal Institution of Chartered Surveyors qualified as quantity surveyors, on 21st November, at the Institution's headquarters.

The Board of Trade announce that it has been decided to continue the extended hours of opening of the Patent Office Library, at 25 Southampton Buildings, Chancery Lane, W.C.2, until 28th December, 1951. The hours are 10 a.m. to 9 p.m., Monday to Friday, and 10 a.m. to 5 p.m., Saturday.

Commissioners' fees have been increased in the Republic of Ireland from 2s. to 3s. for affidavits, and from 1s. to 1s. 6d. for exhibits.

COUNTY BOROUGH OF IPSWICH DEVELOPMENT PLAN

The above development plan was on the 30th October, 1951, submitted to the Minister of Local Government and Planning for approval. The development plan relates to land situate within the County Borough of Ipswich. A certified copy of the plan as submitted for approval has been deposited for public inspection at the Town Hall, Ipswich. The copy of the plan so deposited is available for inspection free of charge by all persons interested between the hours of 9.30 a.m. and 5 p.m. from Mondays to Fridays, and 9.30 a.m. and 12.30 p.m. on Saturdays. Any objection or representation with reference to the development plan may be sent in writing to the Secretary, Ministry of Local Government and Planning, Whitehall, London, S.W.1, before the 20th December, 1951, and any such objection or representation should state the grounds on which it is made. Persons making an objection or representation may register their names and addresses with the County Borough of Ipswich and will then be entitled to receive notice of the eventual approval of the plan.

Wills and Bequests

Mr. James Porter, solicitor, of Conway, left £15,056 (£14,889 net).

SOCIETIES

The council of the INTERNATIONAL LAW ASSOCIATION have elected Mr. W. Harvey Moore, K.C., as honorary secretary of the association, Mr. A. Jaffé as honorary treasurer, and Lord Schuster as a vice-president.

At the meeting of the UNION SOCIETY OF LONDON on 31st October, members heard with great pleasure and satisfaction that a member of the Society and former President had been elected Speaker of the House of Commons. The members requested the President (Mr. H. Townshend-Rose) to convey to the Speaker their congratulations and good wishes on the occasion of his entry upon high office of State.

The Society (meetings in the Common Room, Gray's Inn, at 8 p.m.) announces the following subjects for debate in November, 1951: Wednesday, 14th November (joint debate with the Sylvan Debating Club), "That State subsidy of the Arts is undesirable"; Wednesday, 21st November, "That the cause of international peace would not be served by the re-arming of Germany"; Wednesday, 28th November, "That the identification of party with class is detrimental to the national interest."

More than 600 people attended the fourth annual dance of the NORTH STAFFORDSHIRE AND DISTRICT LAW CLERKS' ASSOCIATION at the King's Hall, Stoke, on 31st October.

CASES REPORTED IN VOL. 95

15th September to 10th November, 1951

Lists of cases reported earlier this year appear in the Interim Index (to 30th June) and at p. 582, *ante* (7th July to 8th September)

"THE SOLICITORS' JOURNAL"

Editorial, Publishing and Advertising Offices: 102–103 Fetter Lane, London, E.C.4. Telephone: Chancery 6855.

Annual Subscription: Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).

Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).

The Copyright of all articles appearing in THE SOLICITORS' JOURNAL is reserved.